



April 27, 2020

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**OPPOSE THE CONFIRMATION OF JUSTIN WALKER TO THE
U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of Justin Walker to the U.S. Court of Appeals for the District of Columbia Circuit.

President Trump's recent announcement that he will nominate Mr. Walker, 37, to the powerful D.C. Circuit is the latest action by the Trump administration designed to deprive health care and critical civil rights protections for millions of Americans. Mr. Walker's zealous opposition to health care access is particularly galling amidst the worst public health emergency this nation has faced in over a century.

In addition, Mr. Walker's elevation to the D.C. Circuit – like his nomination last year to a federal district court judgeship in Kentucky – is a triumph of nepotism over neutrality. Mr. Walker's district court investiture on March 13, 2020 made national headlines because his political patron, Majority Leader McConnell, recessed the Senate in the middle of emergency COVID-19 legislative negotiations so he could travel to Kentucky to attend. Just three weeks after his district court investiture, Mr. Walker was put forward for a D.C. Circuit judgeship that does not even become vacant until September.

At this perilous time in our nation's history, the Senate should maintain a laser focus on efforts to save lives and mitigate the devastating economic impact of COVID-19 on the American people. The Senate should not process judicial nominations – particularly those like Mr. Walker who seek to dismantle health care protections for vulnerable people – until the shock of the pandemic has been diminished.

Hostile to Health Care: In 2018, during the Brett Kavanaugh Supreme Court confirmation fight, Mr. Walker served as one of the embattled nominee's most frequent and partisan propagandists. Mr. Walker wrote several op-eds and conducted 162 media interviews – including 35 interviews on Fox News alone – defending Mr. Kavanaugh.¹ In a July 3, 2018 op-ed explaining why Mr. Kavanaugh's opinion in a D.C. Circuit case demonstrated skepticism of the Affordable Care Act ("ACA"), Mr. Walker revealed his own intense

¹ <https://www.judiciary.senate.gov/imo/media/doc/Justin%20Walker%20SJQ%20-%20PUBLIC.pdf>.



opposition to this landmark health care law. Mr. Walker called the ACA an “indefensible decision” and asserted:

Kavanaugh’s thorough and principled takedown of the mandate was indeed a roadmap for the Supreme Court – *the Supreme Court dissenters*, justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, who explained that the mandate violated the Constitution. I am very familiar with that opinion, because I served as Kennedy’s law clerk that term. I can tell you with certainty that the only justices following a roadmap from Brett Kavanaugh were the ones who said Obamacare was unconstitutional. Kavanaugh was equally critical of the individual mandate under the weak Taxing Clause argument advanced by the government and catastrophically accepted by the Supreme Court.²

Mr. Walker’s view that the Supreme Court’s decision to uphold the ACA decision was “indefensible” and “catastrophic” and his belief that Mr. Kavanaugh had advanced a “takedown” of the law’s individual mandate reveal a deep-seated hostility to the ACA. Moreover, Mr. Walker gratuitously disparaged the ACA at his March 13, 2020 investiture, where he said that the “worst words” he ever heard while clerking for Justice Kennedy were: “The Chief Justice thinks this might be a tax.”³ This was a reference to the 2012 Supreme Court decision in which Chief Justice Roberts cast the deciding vote to uphold the ACA on the grounds that the penalty imposed by the individual mandate constituted a tax. Mr. Walker would be utterly incapable of fairly presiding over cases involving that critical federal law.

In addition, Mr. Walker has supported efforts to deny basic contraceptive coverage to employees. In a July 6, 2018 op-ed, he praised Mr. Kavanaugh’s dissent in *Priests for Life v. U.S. Department of Health and Human Services*, in which Mr. Kavanaugh voted to allow religiously-affiliated employers to opt out of providing standard birth control coverage to their employees. Mr. Walker called Mr. Kavanaugh’s record of ruling on behalf of religious special interests “unparalleled” and stated: “His dissenting opinion in *Priests for Life v. HHS*, where he concluded that the Obama administration’s contraceptive mandate violated the rights of religious organizations, was called ‘pure perfection’ by one of the lawyers challenging the mandate.”⁴ Mr. Walker has a clear ideological bias on reproductive health issues and could not rule fairly in such cases.

Ideological Defense of Kavanaugh: Mr. Walker made other extreme and ideologically charged comments during his relentless defense of Mr. Kavanaugh in 2018. Mr. Walker’s comments demonstrate a cynicism about the confirmation process and a worldview that judges should serve as results-driven ideologues, not fair and impartial arbiters.

- In an interview with Fox News on July 8, 2018 – the day before President Trump announced Mr. Kavanaugh’s nomination to the Supreme Court – Mr. Walker sought to assure the network’s right-wing viewers that, if selected, Mr. Kavanaugh would be “a warrior” and “a fighter for conservative legal principles who will not go wobbly. The man does not have a

² <https://thefederalist.com/2018/07/03/brett-kavanaugh-said-obamacare-unprecedented-unlawful/>.

³ <https://www.youtube.com/watch?v=k5iUfudxuM8>.

⁴ <https://www.nationalreview.com/2018/07/judge-brett-kavanaugh-religious-liberty-warrior/>.



wobbly bone in his body.”⁵ Mr. Walker added: “Judge Kavanaugh was fighting for conservative legal principles way before George Bush was president. He was investigating Hillary Clinton in the 1990s. He’s been fighting for those principles on the D.C. Circuit – the second most important court in the country – over and over and over again.”⁶

- In a Fox News interview on September 28, 2018, Mr. Walker took partisan potshots at Democratic senators who wanted Dr. Christine Blasey Ford to have a fair and adequate process to testify and the opportunity to have her allegations properly investigated by federal officials. Mr. Walker asserted: “If it was deemed credible, it should have been investigated in July and not leaked to the press just before the confirmation vote, which really uses Dr. Ford for the Democrats’ political purposes of delaying this process just for the sake of delaying this process.”⁷
- In an October 2, 2018 Fox News interview, Mr. Walker griped: “The call for an FBI investigation now, by the Democrats, as opposed to two months ago when Senator Feinstein heard about this, just is a transparent attempt to delay for the sake of delay. And remember this has been their strategy all along. It seems like light years ago, seems like decades ago, when we were hearing about, oh, what was it, the documents. Oh, documents this and documents that. Now we can see that was just a delaying tactic. They asked Judge Kavanaugh I don’t know something like 1,300 written question after his testimony at the hearing. My goodness, that’s so transparently an attempt to delay for the sake of delay. Now to hear them, to hear some of them, sound so sanctimonious and talk about his credibility when their whole strategy has been a deceptive farce all along.”⁸
- In an October 6, 2018 interview with Fox News, Mr. Walker asserted: “If we’re gonna have an FBI investigation, I think one of the things we ought to be investigating is how Dr. Ford’s name got leaked to the press against her will. She’s been a victim of this unfair, vicious search and destroy mission against Judge Kavanaugh whose only mission has been to delay for the sake of delay.”⁹ When asked by the Fox News host about what the next “line of attack” from Senate Democrats would be, Mr. Walker retorted: “Oh my goodness. You know Ainsley, there are limits to my imagination.”¹⁰

These cynical, sarcastic, and intemperate comments about the role of judges, and about the good-faith efforts of Senate Democrats to investigate credible allegations against Mr. Kavanaugh, reflect the mindset of a right-wing ideologue who is unsuited to serve in a judicial position.

Supports Radical Theory to Diminish Federal Enforcement of Civil and Human Rights: The D.C. Circuit handles more administrative law cases – involving the operation and procedures of our federal government – than any other federal appellate court. Roughly one-third of the D.C. Circuit’s docket are appeals from federal agency decisions, compared to less than 20 percent for federal circuit courts

⁵ <https://video.foxnews.com/v/5806728724001/#sp=show-clips>.

⁶ *Id.*

⁷ <https://www.yahoo.com/news/kavanaugh-ford-hearing-flawed-222021986.html>.

⁸ <https://video.foxnews.com/v/5843366072001/#sp=show-clips>.

⁹ <https://video.foxnews.com/v/5845318401001/#sp=show-clips>.

¹⁰ *Id.*



nationwide.¹¹ Mr. Walker has advanced extreme views on administrative law, asserting that the Supreme Court should overturn longstanding precedents – specifically *Chevron* and *Humphrey’s Executor* – that laid the legal groundwork permitting federal agencies to help protect civil rights, the environment, health care, labor, workplace safety, education, consumer protection, and more.

For three and a half decades, since 1984, the Supreme Court has required judges to defer to administrative agencies’ interpretations of federal law in most cases where the law is ambiguous and the agency’s position is reasonable. Even the late Justice Scalia defended the *Chevron* doctrine as an important rule-of-law principle.¹² Overturning the *Chevron* precedent, as Mr. Walker advocates, would return that ultimate decision-making authority to judges, who may be ideologically committed to deregulation. *Humphrey’s Executor*, a 1935 Supreme Court decision, safeguarded the creation of independent federal agencies that protect the American people and are insulated from presidential interference.

In a recent article, Mr. Walker argued that the Supreme Court should overturn the precedent set in *Chevron* and *Humphrey’s Executor* because they provide, in his view, excessive deference and delegation to federal agencies. He wrote that “by traveling from *Schechter* to *Chevron*, the Supreme Court has profoundly undermined the democratic accountability central to the Constitution’s conception of self-government.”¹³ He complained that “for every page of law passed by the people we elect, there are 100 pages of laws promulgated by people we didn’t elect” and that “Supreme Court jurisprudence enabled this state of affairs.”¹⁴ And he asserted that “although administrative and constitutional law scholars will correctly view an overturning of *Humphrey’s Executor* as a jurisprudential earthquake, most citizens outside that bubble, including even most lawyers, will likely view its overturning with a collective yawn.”¹⁵ Mr. Walker encouraged Justice Kavanaugh to lead the way in limiting these critical Supreme Court decisions, and he stated that he agreed with an assessment of a law professor who had written: “In Brett Kavanaugh, President Trump may not have found a justice to ‘deconstruct the administrative state’ – in Steve Bannon’s formulation – but he has found one who will help bring it to heel.”¹⁶ Mr. Walker has brought to the bench this radical agenda and disrespect for precedent with which he disagrees.

Judicial Activism on the Bench: Mr. Walker’s short tenure on the district court has already been marred by a decision in which he sought to decide issues not before the court but that synced up with his personal ideological agenda. In *On Fire Christian Center v. Fischer* – without even permitting the defendant an opportunity to present evidence – Mr. Walker issued a temporary restraining order allowing a Louisville church to have in-person attendance at an April 12, 2020 Easter service. He began his opinion with words dripping in sarcasm and exaggeration: “On Holy Thursday, an American mayor criminalized the communal celebration of Easter. That sentence is one that this Court never expected to see outside the pages of a dystopian novel, or perhaps the pages of *The Onion*.”¹⁷ Mr. Walker’s contention is irresponsible and false: the Louisville mayor, Greg Fischer, not only had not “criminalized” Easter services, he had not issued prohibitions of any sort. The mayor had encouraged residents to practice social distancing and avoid services, but he did not ban or prohibit them. In essence, Mr. Walker halted enforcement of a law that did not exist. In a blog post entitled “Courts should not decide issues that are

¹¹ <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2013/winter2013-0313-role-dc-circuit-administrative-law/>.

¹² <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3075&context=dlj>.

¹³ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Walker-KavanaughSchechterChevron.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ <https://reason.com/wp-content/uploads/2020/04/OnFireChristianCenter.pdf>.



not there,” conservative commentator Josh Blackman criticized Mr. Walker’s opinion and said the judge had made “numerous, unforced errors” in this case.¹⁸ Indeed, by manufacturing facts to comport with his ideological agenda, and not permitting the defendant to provide evidence, Mr. Walker demonstrated a troubling degree of bad judgment and judicial activism.

Judgeships as Political Payoff: Mr. Walker’s judicial career amounts to a political payoff from President Trump and Majority Leader McConnell. Mr. Walker has known the Kentucky senator since high school,¹⁹ and as noted previously, Mr. Walker served as a chief lobbyist for President Trump’s controversial Supreme Court nominee, Mr. Kavanaugh. Mr. Walker revealed in his Senate questionnaire that he was first contacted by the White House about a potential nomination to the D.C. Circuit in September 2018 – in the middle of his public relations blitz for Mr. Kavanaugh.²⁰ He had been out of law school for just nine years at that time – substantially below the 12-year minimum years of practice that the American Bar Association (“ABA”) believes are necessary for federal judicial service. Mr. Walker also disclosed in his Senate paperwork that when he interviewed with the White House in January 2020 for the D.C. Circuit judgeship for which he has been selected, he was accompanied by Majority Leader McConnell.²¹ It is highly unusual for a senator to accompany a potential judicial nominee to a White House interview.

When Mr. Walker was nominated and confirmed last year for a seat on the U.S. District Court in the Western District of Kentucky, he received an ABA rating of Not Qualified. The ABA concluded that Mr. Walker – age 37 and at that point 10 years out of law school – lacked sufficient experience, particularly trial experience, to handle the weighty duties and responsibilities of this position. The ABA made the following observations in a letter explaining why it deemed Mr. Walker unqualified to serve as a federal district court judge:

- “The judicial system, the public, the trial bar, and the nominee are not well served by appointing to the bench a lawyer who lacks adequate experience.... Mr. Walker does not meet the minimum professional competence standard necessary to perform the responsibilities required by the high office of a federal district court judge.”²²
- “Mr. Walker’s experience to date has a very substantial gap, namely the absence of any significant trial experience. Mr. Walker has never tried a case as lead or co-counsel, whether civil or criminal.”²³
- “[I]t was challenging to determine how much of his ten years since graduation from law school has been spent in the practice of law. Even crediting the time spent in judicial clerkships, Mr. Walker’s practice experience is less than his 10 years since graduation and

¹⁸ <https://reason.com/2020/04/12/courts-should-not-decide-issues-that-are-not-there/>.

¹⁹ <https://www.rollcall.com/2020/04/17/judge-justin-walker-is-a-window-into-mcconnells-sway-on-federal-courts/>.

²⁰ <http://civilrightsdocs.info/pdf/judicial-nominations/documents/Justin-Reed-Walker-Senate-Judiciary-Questionnaire-PUBLIC.pdf>.

²¹ *Id.*

²² https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2019-07-30NQ-rating-Justin-R-Walker.pdf?logActivity=true.

²³ *Id.*



significantly less than the 12 years of legal practice experience stated in our criteria [as minimally necessary to serve as a federal judge].”²⁴

These pointed comments from the ABA about Mr. Walker’s lack of experience paint a vivid picture of an individual who is unworthy of a lifetime appointment to the federal judiciary. Mr. Walker is one of nine Trump judicial nominees to be rated Not Qualified by the ABA. No president in American history has nominated more unqualified judges.²⁵ When Mr. Walker was brought up for a confirmation vote, not a single Democratic senator voted to confirm him.

Additional Indicia of Extreme Ideology: Mr. Walker has been a member of the Federalist Society since 2006, his first year of law school. He has given 18 speeches at Federalist Society events and has been paid nearly \$10,000 for his appearances,²⁶ and he has served on the Federalist Society’s Executive Committee for Louisville Chapter and on its Executive Committee for International and National Security Law Practice Group. This out-of-the-mainstream organization represents a sliver of America’s legal profession – just four percent – yet more than 80 percent of President Trump’s circuit court nominees and nearly 50 percent of his district court nominees are members of the Federalist Society. Never before has a president attempted to pack the courts with such a high percentage of ideological extremists.

At his March 13, 2020 investiture, Mr. Walker sarcastically thanked “my nomination opponents including the American Bar Association.”²⁷ He continued: “Thank you for serving as an enduring reminder that although my legal principles are prevalent, they have not yet prevailed, and although we are winning we have not won. And that although we celebrate today, we cannot take for granted tomorrow, or we will lose our courts and our country to critics who call us terrifying and who describe us as deplorable.” He added that “in Brett Kavanaugh’s America, we will not surrender while you wage war on our work, or our cause, or our hope, or our dream.”²⁸ These combative, ideological comments – particularly inappropriate at a nonpartisan judicial investiture ceremony – provide further evidence that Mr. Walker views his role as a judge no differently than his role as a Fox News commentator. And his glib, vindictive portrayal of the ABA as an “opponent” reveals a lack of decorum and professionalism. The ABA’s rating of Mr. Walker as Not Qualified was based on his complete lack of litigation and trial experience, not his political views.

Disturbing Lack of Diversity: President Trump’s lack of commitment to diversity on the federal judiciary continues to be deeply disturbing. Mr. Walker, like the vast majority of the president’s judicial nominees, is white and male. President Trump has appointed the least diverse group of nominees in decades.²⁹ Of his 56 appellate nominations, none are African-American, only one is Latinx, and only 11 are women. His district court nominees are similarly homogeneous. Our nation’s great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the guardian of

²⁴ *Id.*

²⁵ <https://fas.org/sgp/crs/misc/IN10814.pdf>.

²⁶ <https://www.judiciary.senate.gov/imo/media/doc/Walker%20Responses%20to%20QFRs.pdf>.

²⁷ <https://www.youtube.com/watch?v=k5iUfudxuM8>.

²⁸ *Id.*

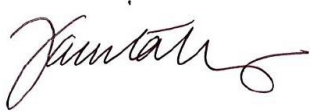
²⁹ <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/>.



our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump's record on judicial diversity is truly abysmal.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Justin Walker for the U.S. Court of Appeals for the District of Columbia Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, or Lena Zwarenstejn, Fair Courts Campaign Director, at (202) 466-3311.

Sincerely,

A handwritten signature in black ink, appearing to read "Vanita Gupta". The signature is fluid and cursive, with a long horizontal stroke at the end.

Vanita Gupta
President & CEO